

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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74-1955

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IN THE
United States Court of Appeals
For the Second Circuit

No. 74-1955

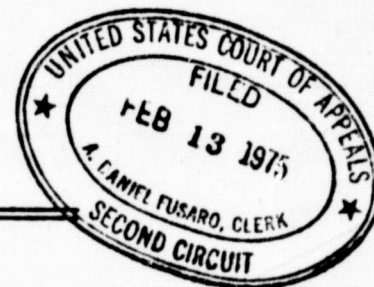
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
against
ROBERT WILNER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74 - 1955

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ROBERT WILNER,

Defendant-Appellant.

BRIEF FOR APPELLANT
ROBERT WILNER

Preliminary Statement

The Appellant, Robert Wilner, appeals from a Judgment of Conviction entered in the United States District Court for the Southern District of New York (Lasker, J.) adjudging him guilty of conspiracy to violate the Federal narcotics laws relating to marijuana in violation of Title 21, United States Code, Section 846 and one substantive offense of possessing

marijuana with intent to distribute in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B). As a result of this conviction, the Appellant was sentenced to one year imprisonment on count one with the execution of sentence suspended. On count two, the Appellant was placed on probation for a period of three years.

The Indictment appears on page 9 of Appellant's Appendix.

STATEMENT OF THE FACTS

Although this trial was relatively long,¹ for purposes of this appeal the facts may be briefly stated. The Indictment in this case charged the Appellant and ten others with a scheme to smuggle large quantities of marijuana from the West Indies into the United States.² At trial, the Government essentially relied upon the testimony of two unindicted co-conspirators and one co-defendant whose case was severed

¹/ The transcript was almost 2200 pages.

²/ Of the eleven persons named in the Indictment, only six were tried along with the Appellant.

prior to trial.³ Although excoriated by exploration of their motive to testify and by factual inconsistencies in their testimony, these witnesses described a highly sophisticated smuggling operation. By private plane, boat and automobile, the marijuana was transported from Jamaica to an isolated island in the Bahamas, then into Florida and finally, into the Southern District of New York.

The Government sought to support the conspiracy charge by testimony relating to five separate and distinct attempts to transport marijuana from Jamaica into the United States. The first trip, according to the testimony of co-conspirator Thurlow, occurred in August of 1971. (T 25 - 47)⁴ Thurlow, a licensed boat captain (T 24), was invited to join the venture by defendant Paul Stephan. (T 29) This operation involved five of the alleged conspirators named in the Indictment, but did not include the Appellant, Robert Wilner. As will be later discussed in detail, the Trial Court, because

^{3/} The co-conspirators were Gerald Mitchell and Richard Thurlow. The co-defendant was Richard Palmer.

^{4/} The letter "T" refers to the trial transcript while the letter "A" introduces reference to the Appellant's Appendix.

of the remoteness in time, found that the August, 1971 trip was not a component of the single conspiracy charged in the Indictment. (A 40)

In November of 1972, the witness Thurlow was contacted by the defendant, Mecca,⁵ and asked to work as captain of a charter boat. (T 54 - 55) The boat was owned by Air Seas Charter, a corporation controlled by the Appellant, Wilner, and the defendants Belanger and Mecca. (T 56) Air Seas Charter was originally formed for fishing excursions in expensively tailored boats suitably designed for that purpose. (T 56 - 56) However, the capital expenditure necessary to renovate two fishing vessels and purchase an airplane required the corporation to obtain a fresh cash flow. According to Thurlow, the pressures of business were to be relieved by profits gained from the illegal importation of marijuana. (T 60) This de facto revision of Air Seas corporate charter occurred in January, 1973 during a conversation with the Appellant, Wilner. (T 60)

After reconnaissance flights, dry runs and detailed surveillance, the group devised a plan by which the marijuana

^{5/} Mecca was severed prior to trial.

would be flown from Jamaica to a Bahamian island where it would be picked up by boat and taken into Florida. (T 96 - 97)

Despite the care and effort devoted to the conspirators plan, Thurlow and his companions were arrested by Bahamian authorities as they were loading the marijuana onto their boat. (T 98) This arrest, however, was regarded only as a temporary setback and soon after, the plan was revived. In May, 1973, via a similarly complex plan, approximately 500 pounds of marijuana was transported from Jamaica to Florida and ultimately to the Rye Hilton Hotel, in Portchester, New York. (T 674 - 675) This trip became the subject of the substantive charge in the Indictment.

One month later, in June of 1973, another attempt was made to import and distribute marijuana. This trip was thwarted by co-conspirator Mitchell's arrest by the New Jersey State Police while he was en route to New York. (T 707) One subsequent trip in August, 1973, was found by the Court not to have been related to the conspiracy charged in the Indictment. (A 40)

STATUTES INVOLVED

Title 21, United States Code, Section 812, is the drug abuse and prevention statute and is a schedule of all controlled substances.

Title 21, United States Code, Section 841(a)(1) states in pertinent part as follows:

"§841 Prohibited acts A -- Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance..."

Title 21, United States Code, Section 841(b)(1)(B) states in pertinent part as follows:

"(b) Except as otherwise provided in Section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than five years, a fine of not more than \$15,000, or both. If any person commits such a violation after one or more prior convictions

of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than ten years, a fine of not more than \$30,000 or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least two years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least four years in addition to such term of imprisonment."

QUESTIONS PRESENTED

1. Whether the Trial Court's amendment of the Indictment, over objection of Appellant's counsel, was reversible error where the amendment prejudiced the Appellant's defense?
2. Whether it was error for the Trial Court to allow the jury to receive a physically altered copy of the Indictment during the deliberations?

POINT I

THE TRIAL COURT'S INSTRUCTIONS TO
THE JURY ON THE SCOPE OF THE CON-
SPIRACY CONSTITUTED AN UNWARRANTED
AMENDMENT OF THE INDICTMENT WHICH
CAUSED PREJUDICE TO THE APPELLANT.

At the conclusion of the Government's case, the attorney for the defendant, Gary Stephan,⁶ argued at length that the Government had failed to prove the single conspiracy pleaded in count one. (A 14 - 38) Instead, the argument went on, the Government's proof had established multiple conspiracies which were at a variance with the charge in the Indictment. (A 30) Such an argument in multiple-defendant conspiracy cases is not uncommon in this Circuit. United States v. Sperling, --- F.2d --- (2nd Cir., October 10th, 1974) sl.op. p.5637; United States v. Borelli, 336 F.2d 376 (2nd Cir., 1964); United States v. Calabro, 449 F.2d 885 (2nd Cir , 1971).

The argument, as this Court is well aware, stems from the United States Supreme Court's decision in Kotteakos

^{6/} Gary Stephan was acquitted on both counts.

v. United States, 328 U.S. 750 (1946). Whether counsel's Kotteakos argument was meritorious is not relevant to this appeal. The Appellant, Robert Wilner, claims, however, that the Trial Court's rulings and instructions addressed to this issue were clearly erroneous and caused irreparable harm to the defense of his case.

In response to the argument of Gary Stephan's attorney, the Trial Court observed that the August, 1971 importation was significantly remote from the more concentrated 1973 activity of the broader group. The Court commented that:

"But August is like a star in the clouds further out in the heavens there. (T 757)

After reserving decision, the Trial Court ruled as follows:

"I conclude that Kotteakos is not applicable to this case, but I do also conclude that the evidence with regard to the events relating to August, 1971, and the events relating to August, 1973, are insufficient to put before the jury as part of the conspiracy alleged in this indictment. I, therefore, intend to instruct the jury and believe that they can find that a single - I'm not going to tell them that they should find, of course, - a conspiracy during the period commencing roughly the beginning of 1973, that is, January, 1973, and running through to the month of June, let's say,

and I am specifically instructing counsel not to refer to the events of August, 1971, or August, 1973 - I guess my instructions are basically to the government counsel - as I will also tell the jury not to consider any such testimony that may be in the record, at least unless government counsel points out to me how such a reference would be, number one, logical in the circumstances and, two, without prejudice to any of the defendants who are on trial." (A 40)

Despite the fact that the Court had trimmed the conspiracy charged in count one to more readily conform to the concept of a single conspiracy, the Court stated its intention to give the so-called "all or nothing" charge that if the jury finds multiple conspiracies under count one, they must acquit. (A 42) Whether this instruction was "more favorable to Appellants than that to which they were entitled," United States v. Sisca, 403 F.2d 1337 (2nd Cir., 1974), is of no moment. The Trial Court, prior to summations, announced that it would so charge. It was perfectly reasonable, therefore, for defense counsel to submit to the jury in summation that if a single conspiracy was not proven under count one, they should acquit. In fact, trial counsel for the Appellant, Wilner, made this precise argument to the jury. Counsel argued that:

"I am going to get very technical with you and I'm going to ask you to think

about this. I submit to you that the government's proof shows a half dozen different conspiracies, if believed.

Remember, in August, 1971, the trip down to Jamaica, no-one even knew Robert Wilner then, according to the testimony. More than one conspiracy within this first count and you must acquit each and every defendant on that count." (A 85)

The cause for complaint in the case at bar is that while on the one hand, the Trial Court afforded this "technical defense," on the other hand, through an unwarranted amendment of the Indictment, it removed this very issue. Counsel for the Appellant, Wilner, prior to the Court's charge, stated that the Kotteakos problem could not be solved by trimming the Indictment until it conformed to the charge of a single conspiracy. As stated by counsel,

"The Grand Jury indicted here and neither Mr. Truebner or you have anything to do with it, or Mr. Pykett." (A 46)

In arguing that his position was different from that of the defendant, Stephan, Appellant's counsel further alleged that the jury should be able to consider the 1971 act. Counsel stated that:

"...we have a right to argue this multiple conspiracy theme to the jury with respect to 1971, so I object to the court's ruling." (A 48)

Prior to summations, the Court expressly instructed the jury to disregard the August, 1971 events:

"THE COURT: Ladies and gentlemen, for what I guess most easily can be called technical reasons, I have ruled that the reference in the indictment to events of August, 1971 or in the record are to be disregarded by you when you come to assessing the evidence here, and for that reason, counsel has been instructed not to deal with the testimony as to that period either and won't be referring to it in the summations, and therefore I want to make that explanation." (A 64)

In the beginning of his charge to the jury, the Trial Court stated that:

"First, I have stricken from the record, and you are not to be concerned with, any evidence relating to the events of August, 1971, or August, 1973.

Second, since I have excluded from your consideration the events of August, 1971, I have stricken from the indictment overt act number one, which relates to those events. In my charge proper, I will point out to you the significance of the overt acts in the indictment, and when we deliver the indictment to you we will, in order to be sure that you do not take overt act number one into consideration, blank it out." (A 114)

With regard to the conspiracy count, the Trial Court, as he had indicated, gave the following charge:

"Now, as you know - and I am still talking about the first element, that is the conspiracy itself - as I have said, the indictment charges and the government contends that the evidence adduced during the trial reveals a single conspiracy.

If you find that the evidence establishes that a number of steps and transactions were required in order to accomplish the goals of the conspiracy charged in the indictment and that all of the activities involved in these transactions were coordinated, nevertheless, by essential aim or purpose and that there was a nucleus of persons who had a basic community of purpose throughout all the transactions, then that would amount to a single overall conspiracy. This would be so even though there may have been a division of labor in fulfilling the objects of the conspiracy.

On the other hand, if you find that the evidence does not show one overall conspiracy, but, instead, shows the existence of a number of separate and independent conspiracies, each with its own aims and objectives and each with his own separate nucleus or corps of conspirators, then you would have multiple conspiracies and the government would have failed to establish the single overall conspiracy as charged and in that event, you would have to acquit the defendants on the charge of conspiracy."
(A 134 - 135)

At a later time in his charge, the Court reminded the jury not to consider August, 1971 by stating that:

"I am deliberately omitting overt act one, which I have stricken from the indictment."
(A 140)

It is not likely that the jury would forget that they were not to consider the 1971 transaction. Overt act number one was physically excised (A 162) when the Indictment was given to the jury. (A 170)

Appellant Wilner's trial counsel took timely exception to this portion of the charge:

"MR. LA ROSSA: I respectfully except to that portion of the charge wherein you directed the jury that they may not consider the August, 1971 incident and, I think you said, the August, 1973, incident. Am I right? I respectfully submit that that vitiates the Kotteakos argument, and for that reason I except." (A 158)

On the basis of the foregoing, Appellant alleges that reversal is required because the Trial Court's revision of the conspiracy count and allowing a physically altered copy of the Indictment to be given to the jury, amounted to the deprivation of a fundamental constitutional right. Ex Parte Bain, 121 U.S. 1 (1887); Dodge v. United States, 258 F. 300 (2nd Cir., 1919). Alternatively, Appellant argues that if the Trial Court's alteration of the conspiracy count does not constitute an "amendment", Salinger v. United States,

272 U.S. 452 (1926); United States v. Colasurdo, 453 F.2d 585 (2nd Cir., 1971), then reversal is required because of the prejudice caused by an alteration which shattered a critical aspect of the defense. United States v. Wolfson, 437 F.2d 862 (2nd Cir., 1970).

Although the law in this area is in a "confused state" and marked by "uncertainty", United States v. Cirami, --- F.2d --- (2nd Cir., January 24th, 1975) sl.op. p.6047, several controlling principles have clearly evolved. The first is that an actual amendment of an indictment without re-submission to a Grand Jury is constitutionally prohibited. Ex Parte Bain, supra. In Heisler v. United States, 394 F.2d 692 (9th Cir., 1968), it was stated that:

"Ever since the decision in Ex Parte Bain, 1887, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849, it has been the rule that any substantial amendment to the body of an indictment renders the conviction void. The reason is that the defendant is not tried on the indictment of the Grand Jury, as is his constitutional right under the Fifth Amendment, but on a different charge, and there is no way of knowing whether the Grand Jury would have returned the amended indictment if given the opportunity. Therefore, an indictment cannot be amended in any substantial way, even with the defendant's consent."

The second relevant principle is that there may be

changes in the Indictment, although unauthorized by the Grand Jury, which do not offend the Fifth Amendment. See, United States v. Cirami, supra.; Overstreet v. United States, 321 F.2d 459 (5th Cir., 1963). However, even where a non-essential change does not rise to the level of an "amendment", an express showing of prejudice will require reversal. United States v. Wolfson, supra. In United States v. Edwards, 465 F.2d 943 (9th Cir., 1972), the Court, in affirming Edwards' conviction, expressly noted that the defendant was not prejudiced. 465 F.2d at p.950. See, also, United States v. De Cavalcante, 440 F.2d 1264, 1272 (3rd Cir., 1971); United States v. Fruchtman, 421 F.2d 1019 (6th Cir., 1970).

The threshold question presented to this Court is whether the Trial Court's modification of the conspiracy count constituted a constitutionally unlawful "amendment" of the Indictment. Nearly fifty years have passed since the United States Supreme Court in Salinger v. United States, supra. held that the withdrawal of a portion of a charge from the jury's consideration "did not work an amendment of the indictment." 272 U.S. 548, 549. It should be noted that in Salinger, however, portions of the charge were withdrawn

because the Government had presented insufficient proof to support these charges. Following Salinger, a line of cases developed which held that while a Grand Jury's charge may not be broadened, it is permissible to narrow the allegations. United States v. Spector, 326 F.2d 345 (7th Cir., 1963). In Spector, which dealt with a pre-trial order limiting proof on the conspiracy count, the Court stated:

"There is an essential difference between a broadening of the charge to embrace conduct which the Grand Jury did not incorporate in the indictment and limiting the charge to excise from the indictment conduct that described no offense. 326 F.2d at p.347.

See, also, Overstreet v. United States, supra.; United States v. Colasurdo, supra.; Heisler v. United States, supra. In United States v. Colasurdo, this Court stated that it was irrelevant whether the Trial Court was right or wrong in narrowing the charge. Further, the Court stated that:

"The reasons for the withdrawal of a part of a charge is to us immaterial."

In the case at bar, however, withdrawing the allegations pertaining to August, 1971 and August, 1973 was not a simple narrowing of the charges, but was rather an impermissible amendment of the Indictment. Plainly stated, the

Indictment in this case charges a single conspiracy which was alleged to have begun on the first day of August, 1971 and which was alleged to have continued to the date of the filing. At the conclusion of the Government's case, an issue was raised as to whether the Government had proved the single conspiracy charged in count one or whether, in fact, multiple conspiracies had been established. Kotteakos v. United States, supra. The Court, finding that there was not a single conspiracy beginning in August of 1971, modified the Indictment until it appeared to conform to what the Government had proven. As one commentator noted:

"Amendment means a change or modification to better an allegation by removing that which is erroneous, corrupt, or superfluous or by substituting something in the place of what is removed." 1
Orfield, Section 7:20, p.577-578.

In the instant case, the District Court, while not expanding the charges, sought to better the allegation contained in count one by sculptering it until it conformed to the Government's proof.

Moreover, this error was compounded by the fact that the Trial Court allowed the jury to receive a copy of the Indictment which had been physically altered. Stewart v. United

States, 12 F.2d 524 (9th Cir., 1926). In United States v. Edwards, supra., one of the relevant considerations in determining whether the defendant's right to indictment by a Grand Jury was violated was whether a change was made on the face of the Indictment. In the case at bar, the Court stated in his charge that:

"When we deliver the indictment to you we will, in order to be sure that you do not take overt act number one into consideration, blank it out." (A 114)

Accordingly, the Assistant United States Attorney physically "repaired" the Indictment. (A 162) And here it was ultimately received by the jury. (A 170)⁷

In Heisler v. United States, supra., where the conviction was affirmed on a different factual setting, the Court specifically noted:

"The indictment was never amended in the literal sense - no change was made upon its face." 394 F.2d at p.696.

In concluding its opinion, that Court stated that:

"However, we suggest to the District Court

^{7/} There was another amendment of the Indictment which reduced the penalty exposure of the defendants and which the Appellant does not challenge. (A 162)

and to the bar that, for the present at least, the only safe course is never to amend the body of an indictment, either on its face or by order not carried out to the point of changing the face of the paper."

Most recently, this Court noted that "convictions have been overturned where language, conceded to be surplusage, had been crossed out on the fact of the indictment." United States v. Cirami, supra., slip. op. at p.6054. While this Court simply stated that "the preferable course is to prepare a retyped 'clean' version of the indictment," the physical alteration of the Indictment in this case is certainly relevant to the issue raised.

The remaining question is whether the Appellant, Wilner, was prejudiced by the modification or amendment of the Indictment. If this Court were to accept Appellant's first argument that the revision was an amendment of the type prohibited by the Bain case, it is unnecessary to go any further. In Gaither v. United States, 413 F.2d 1061, 1072 (D.C. Cir., 1969), it was stated that:

"Because the leading amendment case of Ex Parte Bain rested explicitly upon the Constitution, and because it apparently excludes any notion of a non-prejudicial amendment to the indictment, the concept

of harmless error has not been applied to amendments."

If what occurred at bar, on the other hand, is something less than an amendment, Appellant submits that there has been a sufficient showing of prejudice. It is noteworthy that in the case at bar, no affirmative defense was entered. The defense rested solely on the infirmities or alleged infirmities in the Government's case. The Trial Court - whether correctly or incorrectly - afforded the Appellant yet another negative defense when all defendants were informed that the Court would deliver the so-called "all or nothing charge" with regard to the conspiracy. And, as previously noted, Appellant's trial counsel seized this opportunity. What was given to the Appellant in one portion of the instructions was taken away in another portion when the Court expressly told the jury that they may not consider either August of 1971 or August of 1973. Since Appellant's counsel had already entered this so-called defense without objection from anyone, it was then too late to repair the damage. Counsel was left only with the exception which he now urges on appeal. As in United States v. Wolfson, supra., even if this Indictment could be justifiably retained in its revised form, the prejudice

suffered by the Appellant in this case is insurmountable.

A final comparison to the Ninth Circuit decision in United States v. Edwards, supra., is useful. In affirming Edwards' conviction, the Court succinctly rested its conclusion on the following findings:

1. No change was made on the face of the Indictment.

2. The "change" concerned what was described as "truly surplusage."

3. The defendant, Edwards, was not prejudiced.

465 F.2d at p.950.

The case at bar is dramatically different. Here, there was a change on the face of the Indictment; here, critical portions of the Government's proof were affected and here, as was clearly shown, the Appellant was prejudiced. Under these circumstances, it is respectfully submitted that reversal is required.

Additionally, Appellant Robert Wilner submits that reversal on the conspiracy count of the Indictment would also necessitate reversal on the substantive count, count two. In his charge to the jury, the Trial Court set forth the so-called Pinkerton theory of liability. Pinkerton v. United States,

328 U.S. 640 (1946). (A 150) Although there was proof of the Appellant Wilner's direct participation in the acts alleged in count two, it is impossible to speculate as to whether one or more of the jurors based their finding of guilt of count two on the Trial Court's instructions under Pinkerton. In other words, under the facts of this case, one or more of the jurors may not have accepted evidence of Wilner's direct involvement on the factual allegations of count two, but yet voted for a guilty verdict on a finding that Wilner was a member of the conspiracy.

For this reason, it is submitted, reversal on both counts of the Indictment is required.

POINT II

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT ROBERT WILNER RESPECTFULLY JOINS IN THE ARGUMENTS RAISED BY HIS CO-APPELLANTS IN THIS COURT INsofar AS THEY ARE APPLICABLE TO HIM AND NOT INCONSISTENT WITH THE POINTS RAISED IN THIS BRIEF.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Appellant Robert Wilner's conviction on counts one and two of the Indictment should be reversed.

Respectfully submitted,

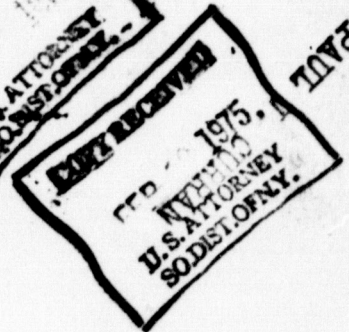
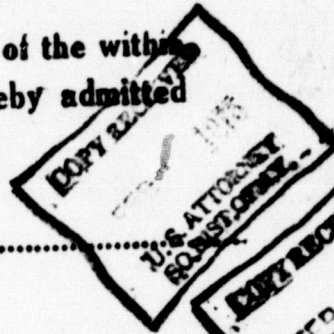
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Two (2)
Service of ~~three (3)~~ copies of the within
is hereby admitted

this day of

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Attorney(s) for



PAUL